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4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA

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7 KEVIN ZIMMERMAN,

8 Plaintiff(s),

9 v.

10 HOME DEPOT U.S.A., INC., et al.,

11 Defendant(s).

Case No. 2:17-CV-1454 JCM (GWF)

ORDER

12
13 Presently before the court is Magistrate Judge Foley's report and recommendation
14 ("R&R"). (ECF No. 11). Plaintiff Kevin Zimmerman filed an objection (ECF No. 14). Defendant
15 Home Depot U.S.A., Inc. ("Home Depot") has not filed a response, and the time to do so has since
16 passed.

17 **I. Facts**

18 On May 20, 2017, plaintiff filed a complaint against defendant Home Depot. (ECF No. 1).
19 The complaint alleges that defendant violated Title III of the ADA. *Id.*

20 On August 31, 2017, the clerk's office filed a notice of intent to dismiss pursuant to Federal
21 Rule of Civil Procedure 4(m), stating "[t]o date no proper proof of service has been filed as to
22 Home Depot U.S.A., Inc." (ECF No. 8).

23 On September 1, 2017, plaintiff filed a motion to extend time to serve the complaint. (ECF
24 No. 9). On September 7, 2017, Magistrate Judge Foley denied plaintiff's motion, stating
25 "Plaintiff's conclusory statements that he has made diligent efforts to serve Defendant are simply
26 not enough [to demonstrate good cause for his failure to serve Defendant within 90 days of filing
27 the complaint.]" (ECF No. 10).
28

1 On October 12, 2017, Magistrate Judge Foley issued the instant R&R. (ECF No. 11). On
2 October 26, 2017, in an attempt to avoid the proof of service issues previously mentioned, plaintiff
3 filed an amended complaint. (ECF No. 13). Plaintiff then filed an objection to the R&R, stating
4 that because he filed an amended complaint F.R.C.P. 4(m)'s proof of service deadline gets reset
5 and he now has until January 24, 2018 to serve defendant. (ECF No. 14).

6 **II. Legal Standard**

7 A party may file specific written objections to the findings and recommendations of a
8 United States magistrate judge made pursuant to Local Rule IB 1-4. 28 U.S.C. § 636(b)(1)(B);
9 LR IB 3-2. Where a party timely objects to a magistrate judge's report and recommendation, the
10 court is required to "make a de novo determination of those portions of the [report and
11 recommendation] to which objection is made." 28 U.S.C. § 636(b)(1). The court "may accept,
12 reject, or modify, in whole or in part, the findings or recommendations made by the magistrate."
13 *Id.*

14 Pursuant to Local Rule IB 3-2(a), a party may object to the report and recommendation of
15 a magistrate judge within fourteen (14) days from the date of service of the findings and
16 recommendations. Similarly, Local Rule 7-2 provides that a party must file an opposition to a
17 motion within fourteen (14) days after service of the motion.

18 **III. Discussion**

19 Plaintiff's objection suggests, without directly stating, that once he files an amended
20 complaint, he may satisfy F.R.C.P. 4(m)'s timing requirement for proof of service by serving the
21 amended complaint within 90 days of filing, therefore obviating the requirements for service of
22 the original complaint.

23 Plaintiff's 4(m) argument and litigation tactics have been rejected by other courts. *See Del*
24 *Raine v. Carlson*, 826 F.2d 698, 705 (7th Cir. 1987); *Patterson v. Brady*, 131 F.R.D. 679, 683
25 (S.D. Ind. 1990). In *Del Raine*, the 7th Circuit stated:

26 We do not believe . . . that the order [allowing the complaint to be amended] started
27 the 120 days running again from the date when the amended complaint was filed.
28 The purpose of allowing complaints to be amended is to enable the pleadings to be
conformed to the developing evidence rather than to extend the time for service
indefinitely.

1 *Id.* at 705.

2 The court agrees with the logic of the above cases. Although plaintiff is correct in stating
3 that he has until January 24, 2018 to service defendant with the amended complaint, (ECF No. 14),
4 this has no effect on his failure to serve defendant with the original complaint. Plaintiff's service
5 of an amended complaint cannot act as a substitute for service when the original complaint was
6 not served within the time period allowed by F.R.C.P. 4(m). *See Del Raine*, 826 F.2d at 705. The
7 court will therefore adopt Magistrate Judge Foley's R&R in its entirety.

8 **IV. Conclusion**

9 Accordingly,

10 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Magistrate Judge
11 Foley's report and recommendation (ECF No. 11) be, and the same hereby is, ADOPTED in its
12 entirety.

13 IT IS FURTHER ORDERED that the instant case be, and the same hereby is, DISMISSED
14 without prejudice.

15 The clerk shall enter judgment accordingly and close the case.

16 DATED November 16, 2017.

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18 _____
UNITED STATES DISTRICT JUDGE